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Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property

JOHN V. ORTH*

“[I]nterest shall follow the principal, as the shadow the body”
Lord Chancellor Hardwicke (1749)¹

INTRODUCTION

If the owner of a fee simple estate in land dies without a valid will or qualified heirs,² the estate ends and the real property escheats to the state.³ The situation with respect to personal property is different. Unclaimed personal property is also taken by the state, but unlike escheated real property, the state does not necessarily take title.⁴ Under the North Carolina Unclaimed Property Act,⁵ personal property that is “unclaimed” is “presumed abandoned.”⁶ In that case, the state treasurer takes “custody”⁷ of the unclaimed property and

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1. Beckford v. Tobin (1749) 27 Eng. Rep. 1049, 1051; 1 Ves. Sen. 308, 310.

2. The North Carolina Intestate Succession Act limits inheritance to decedents’ grandparents and their descendants. See N.C. GEN. STAT. § 29-15 (2013). For an article that questions the limitations on inheritance by more remote collaterals, see John V. Orth, “*The Laughing Heir*”: *What’s So Funny?*, 48 REAL PROP. TR. & EST. L.J. 321 (2013).

3. 1 JAMES A. WEBSTER, JR. ET AL., WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA § 4.10, at 4-13 to -14 (6th ed. 2014) (citing N.C. GEN. STAT. § 116B-2).

4. Personal property may be unclaimed because the last owner died without a valid will or qualified heirs. N.C. GEN. STAT. § 116B-2. In that case, as with escheated real property, title to the property passes to the state. See *id.*; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *298–99 (explaining that ownership of “*bona vacantia*, or goods in which no one else can claim a property. . . . should be annexed to the supreme power by the positive laws of the state”). But personal property may also be unclaimed because the owner left it with a holder and has not communicated with the holder for a significant period of time. In that case, the state takes custody rather than title. See N.C. GEN. STAT. §§ 116B-52(11), -53, -56, -63(b).

5. N.C. GEN. STAT. §§ 116B-51 to -80. “Property,” as defined by the statute, includes all types of tangible and intangible personal property, but does not include interests in real property. *Id.* § 116B-52(11).

6. *Id.* §§ 116B-53(a), (c).

7. *Id.* §§ 116B-56(a), -63(b).

holds it until the owner reclaims the property.⁸ Although the treasurer will return the property to the owner upon proof of title, the state retains the interest that accrued while the property was in the treasurer's custody.⁹

In 2008, the North Carolina Court of Appeals held in *Rowlette v. State*¹⁰ that the state's retention of interest pursuant to the Unclaimed Property Act is not an unconstitutional taking.¹¹ The court reasoned that the proximate cause of the owners' loss is not the state's action, but rather, it is a result of the owners' "neglect."¹² In 2013, in *Cerajeski v. Zoeller*,¹³ the United States Court of Appeals for the Seventh Circuit, in a thoughtful opinion by Judge Richard Posner, rejected that argument and held that a similar provision in Indiana's unclaimed-property act¹⁴ was unconstitutional.¹⁵

This Article reviews the North Carolina Unclaimed Property Act, compares the reasoning in the *Rowlette* and *Cerajeski* cases, and concludes that it is time for North Carolina to recognize that the state should account for interest earned by unclaimed personal property.

8. *Id.* § 116B-67.

9. *Id.* §§ 116B-64, -67(b). "[W]hen property is delivered or paid to the Treasurer, the Treasurer shall hold the property without liability for income or gain." *Id.* § 116B-64. Escheated real property and unclaimed personal property are transferred to the Escheat Fund. *See id.* § 116B-5. The income from the Escheat Fund is used for grants and loans to state residents "enrolled in public institutions of higher education" within the state. *Id.* § 116B-7(a). The North Carolina constitution also provides:

All property that, after June 30, 1971, shall accrue to the State from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons shall be used to aid worthy and needy students who are residents of this State and are enrolled in public institutions of higher education in this State.

N.C. CONST. art. IX, § 10(2). Prior to July 1, 1971, escheated property was "appropriated to the use of The University of North Carolina." *Id.* § 10(1); *see also* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 10, 12, 33, 183 (2d ed. 2013) (describing the history of escheats in North Carolina).

10. *Rowlette v. State*, 656 S.E.2d 619 (N.C. Ct. App. 2008).

11. *Id.* at 625–26 (quoting and relying on *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982)).

12. *Id.* at 626 ("[S]ince it is the owner's neglect that results in the State's possession of the property, the capture of interest accruing on that property by the State is not a taking, and the State is not required to pay the owner 'just compensation.'").

13. *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013).

14. IND. CODE § 32-34-1-30(b) (2014 Supp.) ("[T]he owner is not entitled to receive dividends, interest, or other increments accruing after delivery of the property to the attorney general under this chapter . . .").

15. *Cerajeski*, 735 F.3d at 583.

I. THE NORTH CAROLINA UNCLAIMED PROPERTY ACT

The North Carolina Unclaimed Property Act provides a comprehensive plan for identifying personal property that is deemed “unclaimed,” for its transfer to the state treasurer’s custody, and for its eventual return to the owner upon proof of ownership.¹⁶ Personal property that is deposited or left with a holder¹⁷ is “unclaimed” and “presumed abandoned” under the act if the owner has not communicated with the holder for a certain period of time, varying from one to fifteen years, depending on the type of property.¹⁸ Unpaid wages and uncollected deposits held by a public utility company, for example, are “unclaimed” after one year,¹⁹ while uncashed dividend checks are unclaimed after three years,²⁰ inactive bank accounts after five years,²¹ and uncashed traveler’s checks after fifteen years.²² A holder of unclaimed property valued at fifty dollars or more is required to send to the owner’s last known address a written notice that the property will soon be turned over to the state.²³ Unless the owner then communicates with the holder, the holder must file a report²⁴ and deliver the property to the treasurer,²⁵ who takes “custody” of the

16. See N.C. GEN. STAT. §§ 116B-53(a), (c), -56(a), -63(b), -67 (2013). The North Carolina Unclaimed Property Act is based on the Uniform Unclaimed Property Act, but differs from the uniform act in significant ways. See UNIF. UNCLAIMED PROP. ACT, 8C U.L.A. 114 (2014) (“While the North Carolina act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission and additional matter cannot be clearly indicated by statutory notes.”).

17. Money that is deposited in a bank account is technically no longer the property of the depositor; rather, the depositor becomes a creditor of the bank to the extent of the balance in the account. See *Cerajeski*, 735 F.3d at 579. Nonetheless, this Article will follow the usage in the Unclaimed Property Act and refer to the balance as the depositor’s “property.” See N.C. GEN. STAT. § 116B-52(11) (“The term [‘property’] includes property that is referred to as or evidenced by . . . [m]oney, a check, draft, deposit, interest, or dividend . . .”).

18. N.C. GEN. STAT. §§ 116B-53(a), (c). These periods are unaffected by the statute of limitations. *Id.* § 116B-71(a). Section 116B-71(a) states:

The expiration, before or after the effective date of this Article, of a period of limitation on the owner’s right to receive or recover property . . . does not preclude the property from being presumed abandoned or affect a duty of a holder to file a report or to pay or deliver or transfer property to the Treasurer as required by this Article.

Id.

19. *Id.* §§ 116B-53(c)(13)–(14).

20. *Id.* § 116B-53(c)(5).

21. *Id.* § 116B-53(c)(6).

22. *Id.* § 116B-53(c)(1).

23. *Id.* § 116B-59(b).

24. See *id.* §§ 116B-53(a), 160(a).

25. *Id.* § 116B-61(a). A holder who willfully fails to report or deliver unclaimed property to the treasurer is subject to a civil penalty of \$1000 a day, up to a maximum of \$25,000, plus

property.²⁶ Further, “[i]f the property is interest-bearing or pays dividends, the interest or dividends” must continue to be paid until the property is turned over.²⁷ The fact that the interest or dividends accruing to the property are not held by the holder for the period prescribed by the act does not negate the presumption that they are also abandoned.²⁸ In this case, interest follows principal.

After taking custody of unclaimed property, the treasurer must deliver an annual report to the Administrative Office of the Courts listing the unclaimed property, which the office then distributes to the clerks of superior court for each county, who must make the list available for public inspection.²⁹ Although the treasurer has mere custody of the property, the act empowers the treasurer to sell the property and pass good title to the purchaser.³⁰ If a claimant offers satisfactory proof of ownership, the treasurer delivers the nominal value of the property as of the time it was turned over by the holder,³¹ but does not include interest earned on the property while in the treasurer’s custody.³² According to the act, the treasurer holds unclaimed “property

25% of the value of the property that should have been reported and delivered. *Id.* § 116B-77(b).

26. *See id.* § 116B-56 (“Rules for Taking Custody”).

27. *Id.* § 116B-64.

28. *See id.* § 116B-53(d) (“At the time that an interest in property is presumed abandoned . . . any other property right accrued or accruing to the owner as a result of the interest, and not previously presumed abandoned, is also presumed abandoned.”).

29. *Id.* §§ 116B-62(a), (b), (d). At one time, this was the principal means by which owners or their successors in interest learned that the treasurer had custody of their property; today, the website of the National Association of Unclaimed Property Administrators provides a more convenient way to discover this information. *See* NAT’L ASS’N UNCLAIMED PROP. ADMINISTRATORS, <http://www.naupa.org/> (last visited Apr. 17, 2015).

30. N.C. GEN. STAT. § 116B-65(c) (“A purchaser of property at a sale conducted by the Treasurer pursuant to this Chapter takes the property free of all claims of the owner or previous holder and of all persons claiming through or under them.”); *see also id.* § 116B-65(a). Ordinarily, a mere custodian of property cannot convey good title. *See* RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 76, at 269 (2d ed. 1955). Brown states:

Where the owner of goods places them in the actual physical control of another but does not intend to relinquish the right, as distinct from the power of dominion over them, there is no bailment or possession but only a mere custody. The handing over of goods to a customer in a store to examine in the presence of the clerk is a good example.

Id. Even in the case of a bailment, sale by a bailee to a good-faith purchaser is effective to convey the owner’s title only if “the owner by his words or conduct has expressly or impliedly represented that the possessor of the goods is either the owner thereof, or has authority to sell the same.” *See id.* § 71, at 240–41.

31. N.C. GEN. STAT. §§ 116B-67(a), (b), (d).

32. *Id.* § 116B-64.

without liability for income or gain.”³³ In other words, after the state takes possession of the property, interest no longer follows principal.

II. ROWLETTE V. STATE

In *Rowlette v. State*,³⁴ Kevin Patrick Rowlette and three other named plaintiffs owned property that was delivered to the North Carolina treasurer as “unclaimed.”³⁵ The exact nature and amount of the plaintiffs’ property and the date on which it passed into the custody of the treasurer do not appear in the report, nor is the plaintiffs’ failure to communicate with the holder within the requisite period explained. While in the custody of the state, Rowlette’s property allegedly had earned dividends of \$236.³⁶ The other plaintiffs alleged that the state held “funds” of theirs—presumably accrued interest—in the amounts of \$118.20, \$71.95, and \$84.01.³⁷ Having proved their ownership of the property to the satisfaction of the treasurer, the plaintiffs received the original value of the property, but not the dividends and interest that it had produced.³⁸

The plaintiffs claimed that the treasurer’s retention of the dividends and interest was an unconstitutional taking under both the state and federal constitutions.³⁹ Stressing the presumption that state legislation is constitutional “unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt,”⁴⁰ the North Carolina Court of Appeals rejected the plaintiffs’ claim.

Citing several United States Supreme Court cases, the court of appeals relied principally on *Texaco, Inc. v. Short*,⁴¹ which upheld the constitutionality of Indiana’s Mineral Lapse Act.⁴² That statute provided that a severed mineral

33. *Id.*

34. *Rowlette v. State*, 656 S.E.2d 619 (N.C. Ct. App. 2008).

35. *Id.* at 620.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* The plaintiffs alleged that the treasurer violated article I, section 19, of the North Carolina constitution, as well as the Fifth and Fourteenth Amendments of the United States Constitution. Although the North Carolina constitution, unlike the United States Constitution, does not expressly prohibit the taking of private property for public use without just compensation, state courts have always regarded such a taking as violative of the North Carolina constitution’s “law of the land” clause. *See ORTH & NEWBY, supra* note 9, at 70 (quoting *Johnston v. Rankin*, 70 N.C. 445, 449 (1874)).

40. *Rowlette*, 656 S.E.2d at 621, 626 (quoting *Guilford Cty. Bd. of Educ. v. Guilford Cty. Bd. of Elections*, 430 S.E.2d 681, 684 (N.C. Ct. App. 1993)).

41. *Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

42. *Rowlette*, 656 S.E.2d at 624, 626 (citing *Texaco*, 454 U.S. at 518, 530).

interest that is unused for twenty years automatically lapses and reverts to the current surface owner, unless the mineral owner filed a timely statement of claim in the registry of deeds.⁴³ Quoting *Texaco*, the court of appeals noted that “[t]he Supreme Court ‘has never required the State to compensate [an] owner for the consequences of his own neglect.’”⁴⁴

The North Carolina Court of Appeals also relied on decisions of appellate courts in Pennsylvania,⁴⁵ Indiana,⁴⁶ Louisiana,⁴⁷ and Ohio⁴⁸ that upheld the retention of interest on unclaimed property.⁴⁹ Although the court of appeals recognized that the Ohio Supreme Court had allowed an appeal from the Ohio Court of Appeals,⁵⁰ the decision in *Rowlette* was filed before the Ohio Supreme Court issued its decision, which reversed the lower court and held that the retention of interest is an unconstitutional taking.⁵¹

III. *CERAJESKI V. ZOELLER*

In *Cerajeski v. Zoeller*,⁵² the United States Court of Appeals for the Seventh Circuit held that the Indiana Unclaimed Property Act⁵³ was unconstitutional to the extent that it denied the plaintiff’s claim for the interest

43. See IND. CODE § 32-5-11-1 (2014 Supp.).

44. *Rowlette*, 656 S.E.2d at 624 (quoting *Texaco*, 454 U.S. at 530); see also *id.* at 626.

45. See *Smolow v. Hafer*, 867 A.2d 767, 775 (Pa. Commw. Ct. 2005) (citing *Texaco*, 454 U.S. at 530) (holding that the state treasurer was not required to pay interest on property held on behalf of the plaintiff), *aff’d*, 959 A.2d 298 (Pa. 2008).

46. *Smyth v. Carter*, 845 N.E.2d 219, 224 (Ind. Ct. App. 2006).

47. *Hooks v. Treasurer*, 961 So. 2d 425, 432–33 (La. Ct. App. 2007).

48. *Sogg v. Dir., Ohio Dep’t of Commerce*, No. 06AP-883, 2007 Ohio App. LEXIS 2829, at *15, *28–29 (Ohio Ct. App. June 21, 2007), *rev’d sub nom.* *Sogg v. Zurz*, 905 N.E.2d 187 (Ohio 2009).

49. *Rowlette*, 656 S.E.2d at 624–26.

50. *Id.* at 625.

51. See *Sogg*, 905 N.E.2d at 192–93. Not cited in *Rowlette* was an Illinois Supreme Court decision, *Canel v. Topinka*, 818 N.E.2d 311 (Ill. 2004), which held that the retention of dividends earned on unclaimed property in the state’s custody constitutes an unconstitutional taking. See *id.* at 325 (“At all times the shares of stock remained the private property of plaintiff. Under the circumstances, the dividends, as an incident of ownership, were also private property.”).

52. *Cerajeski v. Zoeller*, 735 F.3d 577 (7th Cir. 2013).

53. IND. CODE §§ 32-34-1-1 to -52 (2014 Supp.). Like the North Carolina act, the Indiana act is based on the Uniform Unclaimed Property Act, but differs from the uniform act in significant ways. See UNIF. UNCLAIMED PROP. ACT, 8C U.L.A. 109 (2014) (“While the Indiana act is a substantial adoption of the major provisions of the Uniform Act, it departs from the official text in such manner that the various instances of substitution, omission and additional matter cannot be clearly indicated by statutory notes.”).

earned on his property while in the state's custody.⁵⁴ The plaintiff, Walter Cerajeski, had an interest-bearing account in an Indiana bank with a balance of less than fifty dollars that had been inactive for three years when it was transferred in 2006 to the custody of the state's attorney general as unclaimed property.⁵⁵ Like the North Carolina Unclaimed Property Act, the Indiana statute does not require individualized notice to an owner of a transfer to the state for property valued under fifty dollars,⁵⁶ and the guardian for the disabled Cerajeski did not learn of the account until 2011.⁵⁷ Recognizing that upon proof of ownership, the Indiana Attorney General would return only the nominal value of the account as of 2006, Cerajeski's guardian filed suit in federal district court seeking a declaration that she was entitled, on behalf of her ward, to the interest accrued on the balance while it was in the attorney general's custody.⁵⁸ The claim was dismissed by the United States District Court for the Southern District of Indiana,⁵⁹ but on appeal to the United States Court of Appeals for the Seventh Circuit, the judgment was reversed and the case was remanded for determination of the amount of interest belonging to Cerajeski.⁶⁰

The Seventh Circuit's opinion was authored by Judge Richard Posner, long a leader in the field of law and economics.⁶¹ Judge Posner began his analysis with the proposition that without an identified owner, "the value of

54. *Cerajeski*, 735 F.3d at 583; *see also* IND. CODE § 32-34-1-30(b) ("[T]he owner is not entitled to receive dividends, interest, or other increments accruing after delivery of the property to the attorney general under this chapter . . .").

55. *Cerajeski*, 735 F.3d at 579. Under the Indiana Unclaimed Property Act, inactive bank accounts are treated as unclaimed after three years, rather than five years, as in North Carolina. *Compare* IND. CODE § 32-34-1-20(c)(12), *with* N.C. GEN. STAT. § 116B-53(c)(6) (2013). In addition, the Indiana attorney general, rather than the state treasurer, as in North Carolina, is the custodian of unclaimed property. *Compare* IND. CODE § 32-34-1-27(a), *with* N.C. GEN. STAT. § 116B-61(a).

56. *Compare* IND. CODE § 32-34-1-26(e)(3), *with* N.C. GEN. STAT. § 116B-59(b).

57. *Cerajeski*, 735 F.3d at 579 (noting that neither the nature of Cerajeski's disability nor the date of his guardian's appointment appears in the report).

58. *Id.* ("Correctly believing that the state wouldn't pay interest if [Cerajeski's guardian] filed a claim, she filed this lawsuit instead, seeking a declaration that she is entitled (on behalf of her ward) to the interest . . ."). The plaintiff's belief was presumably based on the fact that IND. CODE § 32-34-1-29 had been held constitutional in *Smyth v. Carter*, 845 N.E.2d 219, 225 (Ind. Ct. App. 2006).

59. *Schunn v. Zoeller*, No. 1:11-cv-1705-JMS-DKL, 2012 U.S. Dist. LEXIS 160119 (S.D. Ind. Nov. 8, 2012), *rev'd sub nom. Cerajeski*, 735 F.3d 577.

60. *Cerajeski*, 735 F.3d at 583. The appellate court assumed that after a declaration of Cerajeski's right in the interest, a claim to the state attorney general would follow. *Id.* at 579.

61. *See* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 1125 (8th ed. 2013) (describing Judge Posner as "the principal practitioner" of the study of law and economics).

property is not being maximized.”⁶² He noted that Indiana law addresses this problem in two ways. First, the state takes *title* to unclaimed personal property after twenty-five years by “escheat.”⁶³ Second, the state takes *custody* of unclaimed personal property after a much shorter period under the Indiana Unclaimed Property Act—in the case of bank accounts, after three years.⁶⁴ The reason for taking custody under the act, according to Posner, is twofold: to return the property to the stream of commerce and to prevent the appropriation of unclaimed property by the present holder.⁶⁵

Posner held that Indiana’s “confiscation of the interest on Cerajeski’s principal was . . . a taking of a part of his property.”⁶⁶ He explained, “if you own a deposit account that pays interest, you own the interest.”⁶⁷ Writing for the Seventh Circuit panel, which included Judge Frank Easterbrook, who is also noted for his use of economic analysis of law,⁶⁸ Posner wrote:

We think we know what has led the state into error. It is its misunderstanding of the concept of abandonment, a misunderstanding fostered by the misleading term “presumed abandoned” in the Unclaimed Property Act. Abandonment of property other than as a consequence of death without a valid will or heirs means at common law a voluntary relinquishment of ownership.⁶⁹

Cerajeski never voluntarily relinquished either the principal in his account or the interest that it was earning.⁷⁰ The court rejected the state’s position that the principal would escheat in twenty-five years, but the interest

62. *Cerajeski*, 735 F.3d at 579. Actually, the money deposited with the bank became the property of the bank and was used as part of its capital. *See id.* The identity of the depositor—the bank’s creditor with respect to the amount of the deposit—was also known, but the statute deemed the deposit contract “unclaimed” and “presumed abandoned,” and required the bank to pay the balance over to the state’s custody. *Id.* (citing IND. CODE §§ 32-34-1-17(b), -20(c)).

63. *Id.* at 578 (citing IND. CODE § 32-34-1-36). Although commonly called “escheat,” title to personal property does not technically escheat; rather, the state takes title by a form of adverse possession. *See Adverse Possession*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining adverse possession as “[t]he enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open, and notorious”).

64. *Cerajeski*, 735 F.3d at 579 (citing IND. CODE § 32-34-1-20(c)).

65. *See id.* at 583 (first citing *La. Health Serv. & Indem. Co. v. Tarver*, 635 So. 2d 1090, 1092 (La. 1994); then citing *Unclaimed Property Act Summary*, UNIFORM L. COMMISSION, <http://uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Apr. 27, 2015)).

66. *Id.* at 580.

67. *Id.* (citing *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003)).

68. Easterbrook co-authored *The Economic Structure of Corporate Law* with Daniel R. Fischel. *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

69. *Cerajeski*, 735 F.3d at 582.

70. *Id.* at 581.

in only three, pointing out that unclaimed property acts “are not escheat statutes.”⁷¹ In addition, the court explained:

There is no articulated basis for fixing a 25-year term for escheat of principal and only 3 years for escheat of interest—a period so short as to present a serious question whether it is consistent with the requirement in the Fourteenth Amendment that property not be taken without due process of law.⁷²

Posner admitted that “[t]he state can charge a fee for custodianship and for searching for the owner, but the interest on the principal in a bank account is not a fee for those services.”⁷³

IV. DISCUSSION

Without the North Carolina Unclaimed Property Act, interest on deposit accounts and dividends on securities would continue to accumulate for the benefit of the owner. The statutory requirement that the property be transferred to the state’s custody is what stops the owner’s beneficial accumulation. While the transfer to the state protects the owner from misappropriation by the holder,⁷⁴ that protection does not have to be purchased with the loss of the owner’s subsequent gains. The Uniform Unclaimed Property Act, for instance, on which the North Carolina act is largely based, requires the custodian to account for interest for up to ten years at the lesser of the legal rate of interest or the rate paid while the property was in the possession of the holder.⁷⁵ In addition, the state’s failure to account for interest actually diminishes the value of the owner’s principal, since the

71. See *id.* at 580–81 (quoting *Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 872 (7th Cir. 1999)). Posner notes:

[T]he unclaimed-property acts enacted by Illinois and other states, including acts based on the Uniform Unclaimed Property Act of 1995, as the Indiana act is, “are not escheat statutes. The state does not acquire title to the property. It is merely a custodian. The owner can reclaim his property at any time.”

Id. (quoting *Commonwealth Edison Co.*, 174 F.3d at 872).

72. *Id.* at 582. The question would be one of substantive due process. See JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 51–72 (2003).

73. *Cerajeski*, 735 F.3d at 583.

74. See *id.* (noting that unclaimed-property acts protect property owners against “lucrative silence” by the holder).

75. UNIF. UNCLAIMED PROP. ACT § 11 (UNIF. LAW COMM’N 1995). The drafters of the uniform act do not explain their rationale for terminating the state’s obligation to account for interest after ten years, while otherwise maintaining that “[t]he owner’s rights are never cut off; under this Act, the owner’s rights exist in perpetuity.” *Id.* § 16 cmt.

economic function of interest is, in part, to compensate the owner for the principal's loss of value due to inflation.⁷⁶

While the state's retention of interest is a loss to the owner, it is a gain to the state; interest on unclaimed property is a source of revenue and is treated as such by the state.⁷⁷ The state may be entitled to compensation for the cost of collecting and safeguarding unclaimed property, but there is no reason to assume that the amount of lost interest is proportional to the cost of state services. The Uniform Unclaimed Property Act, in a section not included in the North Carolina act, allows retention of reasonable charges and other fees for custodianship.⁷⁸ It is unclear why the statutory drafters considered it necessary to label property as "unclaimed" and "presumed abandoned" to justify the state's taking of the property into its safekeeping after a period of inactivity. The doctrine of *parens patriae*, by which the state protects those unable to protect themselves, would seem sufficient justification.⁷⁹ Rather, as Judge Posner pointed out in *Cerajeski*, the labels have proved to be a source of confusion.⁸⁰ Abandonment is a means of terminating title to personalty,⁸¹ but abandonment requires more than a surrender of dominion and control. As the North Carolina Supreme Court explained in *State v. West*,⁸² which involved official documents that were missing for over 200 years:

76. See JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 619 (9th ed. 2013) (defining "inflation risk" as the risk that the rate of inflation will exceed the interest rate, causing the real value of the principal to decline).

77. See, e.g., *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 390 (3d Cir. 2012) ("Although '[t]he practical reason behind the states' action is to prevent unclaimed personal property being eventually appropriated by the present holder,' the state being 'better able to provide long-term . . . custody' of the property, 'it is sometimes admitted that the statutes are also a means of raising revenue.'" (alteration in original) (quoting John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2d 73, 78–79 (2009))), *cert. denied*, 133 S. Ct. 2735 (2013); *La. Health Serv. & Indem. Co. v. McNamara*, 561 So. 2d 712, 716 (La. 1990) (describing "the primary rationale" for the unclaimed-property acts as "revenue raising").

78. UNIF. UNCLAIMED PROP. ACT § 13(b).

79. Compare the power of state attorneys general to enforce the terms of charitable trusts. DUKEMINIER & SITKOFF, *supra* note 76, at 768 ("Under traditional law . . . , the state attorney general, as *parens patriae*, has primary responsibility for enforcing charitable trusts."). Today, the North Carolina Attorney General shares the responsibility with "[t]he settlor . . . the district attorney, a beneficiary, or any other interested party." N.C. GEN. STAT. § 36C-4-405.1 (2013).

80. *Cerajeski v. Zoeller*, 735 F.3d 577, 582 (7th Cir. 2013).

81. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.20[2], at 34-183 to -184 (Michael Allan Wolf ed., 2008). Powell states that "[o]wnership of estates in land cannot be lost by abandonment at common law, even when originally acquired by adverse possession. The opposite doctrine would violate the Statute of Frauds." *Id.* (citations omitted).

82. *State v. West*, 235 S.E.2d 150 (N.C. 1977).

[A]n essential element of abandonment is the intent of the owner to relinquish the article permanently. “An abandonment must be made to appear affirmatively by the party relying thereon and the burden is upon him who sets up abandonment to prove it by clear, unequivocal, and decisive evidence.”

It is the owner who must have the intent so to terminate his title. Thus, it is not enough that the custodian into whose hands the owner entrusted it intentionally discarded it.⁸³

As shown in *West*, the mere passage of time, even of centuries, is not conclusive evidence of an intent to abandon.

There are probably many reasons why owners allow their deposit accounts and other property to remain inactive for significant periods, but not all owners do so simply out of “neglect.”⁸⁴ In *Cerajeski*, for example, the depositor’s inactivity was apparently caused by his disability.⁸⁵

Cerajeski also illustrates another reason for concern with the Unclaimed Property Act: because the balance in Walter Cerajeski’s account was less than fifty dollars, the Indiana act did not require the bank to send him any notice that his property was about to be delivered to the state and would cease accruing interest.⁸⁶ Small depositors in North Carolina are given no more protection⁸⁷—only those with larger balances must be sent written notice.⁸⁸

CONCLUSION

It is time for North Carolina to pay interest on unclaimed property in its custody. In many cases, as with the *Rowlette* plaintiffs, the property transferred to the state was producing dividends or interest for the benefit of

83. *Id.* at 157 (quoting 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 36 (1962)); see also DAVID HOWARD, *LOST RIGHTS: THE MISADVENTURES OF A STOLEN AMERICAN RELIC* 1–11 (2010) (describing North Carolina’s recovery of its original copy of the Bill of Rights, missing since 1865).

84. *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1981) (“[T]his Court has never required the State to compensate the owner for the consequences of his own neglect.”).

85. *Cerajeski*, 735 F.3d at 579 (“[W]e assume the reason for [Cerajeski’s] failure to indicate any interest in the account for the required three years was related to whatever disability led to the appointment of a guardian for his affairs, but there is nothing in the record about this.”). The court expressed surprise that “the attorney general of Indiana wants to take those fruits [of property ownership] from someone who may be incompetent to safeguard his property.” *Id.* at 583.

86. *Id.* at 579 (citing IND. CODE §§ 32-34-1-26(a), (e)(3) (2014 Supp.)).

87. See N.C. GEN. STAT. § 116B-59(b) (2013).

88. The effect is eerily reminiscent of a biblical verse: “For whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath.” *Matthew* 13:12 (King James).

its owner up to the time of its transfer, and would have continued to do so if the holder had not been required by the unclaimed property act to deliver the property to the state treasurer. In some cases, as apparently with Walter Cerajeski, an owner's failure to communicate periodically with the holder is attributable to excusable cause rather than to neglect. But the principal reason for the state to account for interest is that it has taken custody of private property and is receiving benefits from it. Dividends and interest belong to the owner of the property that produces them. Interest follows principal. For the state to retain such interest is to take private property for public use without just compensation.